

# Provisional Damages in Clinical Negligence Claims: Practical Steps to Consider

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## Introduction

Provisional damages claims can arise in clinical negligence claims, as in any other claim for personal injury. Orders for provisional damages are an exception to the usual principle that compensation is awarded on a 'once and for all' basis.

The twin aims of such awards, which are two sides of the same coin, are (a) to avoid over-compensating a claimant for the small risk of a serious deterioration in their condition which might never arise and (b) to avoid under-compensating the unlucky claimant who does in fact develop a serious deterioration by permitting them to return to court to seek further damages.

## A warning about the need to consider claims for provisional damages

The importance of giving proper consideration to whether it is appropriate to bring a claim for provisional damages cannot be overstated. If there is a prospect of bringing a claim for provisional damages, it is vital for this to be communicated to the claimant. It should come as no surprise that the failure to advise a claimant of the prospect of provisional damages has given rise to claims for professional negligence.

In the recent case of *Witcomb v J Keith Park Solicitors* [2023] EWCA Civ 326, the Court of Appeal held that the claimant was not out of time in his professional negligence action against his former solicitors in respect of their failure to advise him about the prospect of a claim for provisional damages.

The claimant in *Witcomb* had suffered serious injuries to his right leg and foot in a motorcycle accident. Post-settlement on a full and final basis, his condition deteriorated markedly and much more quickly than had been anticipated and he was advised that he needed a below knee amputation of the right leg. It was only when the claimant sought further advice about re-opening his claim and was disabused of the notion that a lump sum

payment in full and final settlement had been the only option available to him, that he was deemed to have had the requisite knowledge for limitation to begin running.

Meanwhile, in *Dunhill v W Brook & Co (1) Crossley (2)* [2016] EWHC 165 (QB) a claim was brought against the first defendant firm of solicitors and the second defendant counsel by the pedestrian victim of a motorcycle collision who suffered a serious closed head injury. The court held on the facts of that case that the claimant had not been advised negligently, given that the defendant's lawyers in the personal injury claim would not have agreed to settle on any other than a full and final basis.

## What is the test?

The Court may award provisional damages where such a claim has been pleaded, and where the Court is satisfied that the conditions of Section 32A of the Senior Courts Act 1981 or Section 51 of the County Courts Act 1984 have been met.

The wording of section 32A(1) of the Senior Courts Act and s.51(1) of the County Courts Act are in identical terms:

*"This section applies to an action for damages for personal injuries in which there is proved or admitted to be a **chance** that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition"* (emphasis added).

A couple of examples in reported clinical negligence cases include *Yale-Helms v Countess of Chester Hospital NHS Foundation Trust* [2015] 2 WLUK 482, in which Blake J allowed an appeal against a district judge's decision not to allow the claimant, who had been born with cerebral palsy due to the defendant's negligence, to amend her particulars of claim to include a claim for provisional damages for the risk of developing epilepsy; and *AB (by his litigation friend CD) v Royal Devon & Exeter NHS Foundation Trust* [2016] EWHC 1024 (QB), in which Irwin

J (as he then was) awarded provisional damages (which were not contested) to a claimant whose developing spinal abscess had been negligently missed by the defendant, for the small but lifelong risk of syringomyelia.

## What should we look for when considering whether there is an arguable claim for provisional damages?

The leading case interpreting the statutory provisions giving the court the power to award provisional damages is *Curi v Colina* [1998] EWCA 1326, approving the three-stage test set out by Scott Baker J (as he then was) in *Willson v Ministry of Defence* [1991] ICR 595:

- 1) Is the chance of the Claimant developing some disease or suffering some other deterioration in physical or mental condition measurable rather than fanciful?
- 2) Can the disease or deterioration in physical or mental condition be described as serious?
- 3) If the answer to the questions above are answered in the affirmative, should the Court exercise its discretion to award provisional damages?

To qualify as a 'chance' there must be a '*measurable rather than fanciful*' risk of serious deterioration. Provided it is quantifiable, the percentage risk does not need to be high for the Court to exercise its discretion of award provisional damages.

For example, in the case of *Kotula v EDF Energy Networks & Others* [2011] EWHC 1546 (QB), Irwin J (as he then was), made an order for provisional damages when the risk of the Claimant developing really serious consequences from a syringomyelia was as low as 0.1%; likewise, in *Mitchell v Royal Liverpool and Broadgreen UH NHS Trust* (unreported, 17.07.06), Beatson J permitted an amendment to plead provisional damages in respect of a 0.15% risk of serious consequences of syringomyelia.

The question of seriousness is a question of fact depending on the circumstances of the case, including the effect of the deterioration on the claimant. In the authors' view, it should usually be obvious if this criterion is likely to be met but, given the subjective element to the test, it is sensible to canvas in conference the anticipated impact of a specific deterioration on the specific claimant's activities, capability, life expectancy or financial position.

The question of the exercise of the discretion turns on factors including whether there is a clear-cut identifiable threshold (i.e. opposed to a continuing deterioration), the degree of risk and the consequences of the risk, and

a weighing up of the possibilities of doing justice by a once-and-for-all assessment against the possibility of doing better justice by reserving the claimant's right to return to court.

The absence of a clear-cut threshold can be fatal, as in *Mathieu v Hinds* [2022] EWHC 924 (QB), in which Hill J held that on the current state of scientific knowledge, a post-traumatic brain injury dementia is often not severable from the consequences of the initial TBI, and thus held it would not be appropriate to exercise the discretion to award provisional damages.

Each of these issues must be considered with your liability and condition and prognosis experts. Can the expert(s) put a figure on the risk of developing the disease or serious deterioration? What impact would the serious deterioration or disease have on the Claimant, should it materialise? Can the expert(s) identify a clear-cut event or series of events, or is the situation one where the Claimant's risk is the deterioration of an already progressing condition? Lastly, provisional damages orders are commonly time-limited: it is important to establish whether the chance of the deterioration will remain for the rest of the Claimant's life expectancy or reduce over time? Given the requirements in PD 16 of the CPR to state the claim for provisional damages within the Particulars of Claim, it is best to iron out the answers to these questions as early as possible.

## A claim for provisional damages may succeed in part only

In the case of *Butler v Ministry of Justice* [2015] EWHC 3384 (QB), one of the issues was whether damages should be awarded on a provisional or final basis. The claimant had suffered a "*bizarre and unique*" injury to his right foot. He had subsequently developed chronic regional pain syndrome and amputation had been seriously considered. At the time of trial the claimant had decided against amputation but acknowledged he may need to revisit his decision.

The court declined to make an award for provisional damages in respect of the 25% risk of amputation, given that the claimant currently had a painful, non-weight bearing cold and/or hot discoloured foot and that amputation might provide a 70% improvement in overall symptoms and function. However, the court did exercise its discretion to make an award of provisional damages to cover the 7.5% risk post-amputation of the development of chronic regional pain syndrome or phantom limb pain or the failure of the stump to heal.

*Mathieu v Hinds* (cited above) is another example of a provisional damages claim succeeding in part only: the claim in respect of the risk of developing epilepsy succeeded in that case, even though the claim for post-TBI dementia did not.

## What to do if the claim for provisional damages is settled before the commencement of proceedings

Paragraph 5.50 of the King's Bench Guide specifies that a claim for provisional damages that has been settled before the commencement of proceedings, and in which the sole purpose of the claim is to obtain a judgment by consent, must be issued under Part 8.

Paragraph 8.12 of the KB Guide says that the claimant must state in their claim form that the parties have reached agreement and request a consent judgment, as well as setting out the matters specified in paragraph 4.4 of the Practice Direction to Part 16 and attaching a draft order in accordance with paragraph 4.2 of PD 41A.

Once the claim for provisional damages has been approved, the case file will be electronically stored by the court for the relevant period in accordance with paragraph 3.3 of PD 41A; but beware, as paragraph 3.6 reminds legal representatives that it is their duty to preserve their own case file.

## What happens to the claim for provisional damages if the claimant dies?

The question arose recently in *Power v Bernard Hastie & Co Ltd & ors* [2022] EWHC 1927 (QB) of whether the estate of a deceased claimant can take advantage of the claimant's right, under a provisional damages order, to ask the court to award further damages on the grounds that he developed a condition or disease that was specified in the order.

Johnson J disagreed with the defendant's contention that the right to pursue such an application did not survive the deceased's death and approved the decision of His Honour Judge Roberts in the County Court case of *Guilfoyle v North Middlesex University Hospitals NHS Trust* (Central London County Court, 4 April 2018).

The court held that a judgment given for provisional damages gave a claimant a continuing residual right to seek further damages, in accordance with the order and the rules of court, which itself amounted to a continuing course of action. This right, which had vested in the

claimant, was transferred to the applicant, the deceased's nephew executor, by operation of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934.

The court further noted that an application for further damages under the provisional damages order was not a claim for personal injuries within the meaning of section 11 of the Limitation Act 1980 and thus there was no limitation period, albeit there may be a specific period within which the application may be brought, as stipulated within the order itself.

## Provisional damages and Part 36 offers

Part 36 of the Civil Procedure Rules contains express rules about offers which include a claim for provisional damages.

CPR 36.19 states that where an offeror is offering to agree to the making of an award for provisional damages, the Part 36 offer must also state (a) that the sum offered is in satisfaction of the claim for damages on the assumption that the injured person will not develop the disease or suffer the type of deterioration specified in the offer; (b) that the offer is subject to the condition that the claimant must make any claim for further damages within a limited period; and (c) what that period is.

Do not forget that the claimant must act promptly where such an offer is accepted by an offeree: within seven days of the date of acceptance of the offer the claimant must apply to the court for an award of provisional damages under CPR 41.2.

## Conclusion

Provisional damages may be an exception to the usual principle that compensation is awarded on a 'once and for all' basis, but orders for provisional damages are by no means exceptional. It is vital to be acquainted with the relevant criteria and to identify at the earliest possible stage whether there is a viable claim for provisional damages, as well as keeping abreast of the many specific procedural requirements.